IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-496

BENSON A. WOLMAN, FREDRICK CHAMBERS, PATRICIA J. KEENAN, BARBARA KAYE BESSER, NANCY R. TERJESEN, and MARJORIE WRIGHT,
Appellants,
v.
MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY,

(Additional title appears on next page)

On Appeal from a Three Judge United States District Court for the Southern District of Ohio Eastern Division

# BRIEF OF THE CITY OF NEW YORK AMICUS CURIAE

W. BERNARD RICHLAND
Corporation Counsel
of the City of New York,
Counsel for City of New York,
Amicus Curiae
Municipal Building
New York, New York 10007

L. KEVIN SHERIDAN,
BERYL KUDER,
of Counsel.

Treasurer of the State of Ohio; THOMAS E. FERGUSON, Auditor of the State of Ohio; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO; HANNA FEIGENBAUM, JAMES GRIT, EWALD KANE and HELEN S. KOLOSKI,

Appellees.

INDEX



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

---

NO. 76-496

---

BENSON A. WOLMAN, FREDRICK CHAMBERS, PATRICIA J. KEENAN, BARBARA KAYE BESSER, NANCY R. TERJESEN, and MARJORIE WRIGHT,

Appellants,

-against-

MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY, Treasurer of the State of Ohio; THOMAS E. FERGUSON, Auditor of the State of Ohio; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO; HANNA FEIGENBAUM, JAMES GRIT, EWALD KANE and HELEN S. KOLOSKI,

Appellees.

---

On Appeal from a Three Judge United States District Court for the Southern District of Ohio Eastern Division

---

# BRIEF OF THE CITY OF NEW YORK AMICUS CURIAE

---

## Statement

This brief is submitted pursuant to

Supreme Court Rule 42 (4) on behalf of New

York City as amicus curiae in this case.

## Interest of the Amicus Curiae

(1)

Initially, New York City's interest in this case arises from the fact that Irving Anker, Chancellor of the Board of Education of the City of New York, is a defendant in a case now pending in the United States District Court for the Southern District of New York in which Chancellor Anker's method of implementing Title I of the Elementary and Secondary Education Act of 1965 (Publ. L. No. 89-10; codified as amended, 20 U.S.C. §241 a et seq.; hereinafter referred to as Title I) is being challenged. National Coalition of for Public Education and Religious Liberty, et al. v. Califano, et al., 76 Civ. 888 (CET).*

*A three-judge district court has been convened pursuant to order of Judge Tenney dated February 1, 1977.



Specifically at issue in the National Coalition case are Chancellor Anker's use of Title I funds to finance the assignment of public school teachers to perform compensatory educational services within religiously affiliated nonpublic schools during regular school hours and the regulations of the United States Office of Education issued pursuant to Title I and Title I itself insofar as they are deemed to authorize Chancellor Anker's above described use of Title I funds. Some aspects of Chancellor Anker's described use of Title I funds resemble features of Section 3317.06 of the Ohio Revised Code, the Ohio aid program challenged in this case. New York City is thus concerned that no decision be rendered in this case in such a fashion as to bring, or arguably bring, Chancellor Anker's practices under Title I within its purview.

It is requested that this Court reserve for the National Coalition case the question of the constitutionality of Chancellor Anker's practices under Title I. When that case reaches this Court, and only at such time, will there be the thoroughly developed factual record and the sharp definition of issues which result from a full-fledged adversary proceeding and which are appropriate and necessary for such a decision.

(2)

Title I is targeted to aid educationally deprived children who come from areas with high concentrations of low-income families. New York City's interest in the benefits of this program, and hence its continued constitutional viability, is based on a number of considerations.

In New York City, Title I services consist of corrective reading, corrective



mathematics, English as a second language, clinical and guidance services and special services for handicapped children. This year there are approximately 165,035 children in the New York City School District participating in Title I programs*. The total eligible population is 429,878.** These figures constitute approximately 12% and 31% of the total number of students registered in elementary and secondary schools, respectively.

Clearly it is essential to New York City that all students - whether they be from public or nonpublic schools - who emerge into its population obtain the full benefits of a basic elementary and secondary

*Approximately 152,523 are enrolled in public schools and 12,512 in nonpublic schools.

**395,901 are from public schools, and 33,977 from nonpublic schools.

education - i.e., essential language, reading and math skills. These skills are often determinative of an ability to effectively participate in the economy and social life of the City.

Additionally, those students who benefit from Title I programs are better equipped to take advantage of and contribute to the opportunities for higher education offered by the City University of New York, an institution open to all New York City resident secondary school graduates. If a student has benefited from the remedial services offered by Title I programs, he is less likely to require remedial education at City University; and the University is thereby relieved of the burden of providing such education.

Finally, just as New York City benefits from an effectively educated popu-



lation, it bears the costs of an educationally disadvantaged one. Educationally deprived students are most likely to become or remain victims of poverty - a tenacious condition the human, social and economic costs of which are too well known to bear repetition here. In addition, it is often the educationally handicapped and impoverished young people who resort to the delinquent and other anti-social behavior claiming so much of this City's attention. The City is vitally concerned that Title I remedial educational programs not be diminished or impaired in any manner.

(3)

In addition to the interest in the level of educational attainment of its population generally, New York City has two, more specific, interests in Title I. In order to qualify for Title I participation,

the New York City school district is required to "provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools ... ." 20 U.S.C. §241e-1(b)(2) (emphasis added). The regulations of the Commissioner of Education provide that "[E]ducationally deprived children [in nonpublic schools] shall be provided with genuine opportunities to participate" in Title I services. 45 C.F.R. §116a.23(a), as amended by 41 Fed. Reg. 42894 (Sept. 28, 1976) (emphasis added).

New York City has special insight into the matter of providing "genuine opportunities" for Title I participation by nonpublic school students. During its first year of implementation, New York City provided Title I services solely in after-



school and evening sessions on public school premises. Participation by nonpublic school students was minimal. The next year services were provided in part on nonpublic school premises and in part on public school premises. Significant participation by nonpublic school students was achieved only for those programs offered on the premises of the nonpublic school. New York City has thus found that the most and virtually only genuine opportunity for participation in Title I services by nonpublic school students occurs when those services are offered on the premises of the nonpublic schools.

Any other method of implementing Title I for nonpublic school students, in addition to lessening the effectiveness of the program, would raise substantial problems for New York City. Provision

of Title I services for nonpublic school students on off-school premises would very likely require transporting many students, with attendant safety considerations and added costs. If such services are provided after regular school hours,* this will raise an additional safety problem.

An additional problem for the City which would be posed by termination of Title I services at nonpublic schools is the likelihood that substantial numbers of parents of children needing such services would enroll their children in the public schools even though they would have otherwise preferred to enroll them in a nonpublic school. This would add a tremendous burden to an already financially

*Article XI, Section 3, of the New York State Constitution has been interpreted to prohibit dual enrollment, i.e., the use of public school facilities by nonpublic school students during regular school hours.



strapped public school system.

Additional energy, or fuel, consumption is yet another factor involved in the matter of transportation to and use of off-nonpublic school premises for Title I services. No large City today can embark on any program without heed to restraints imposed by overburdened municipal services, the need for fuel conservation and pressing regard for public safety. These restraints must be factored into any consideration of alternate methods of providing Title I services to nonpublic school children. One cannot help but surmise, however, that the greatest loss New York City faces is the loss of the most effective remedial help possible for the greatest number of Title I eligible students - i.e., educationally deprived children from low income neighborhoods - should its present program be cast

in constitutional jeopardy by a decision in this case.

New York City's special interest in the question of the constitutionality of the Title I program for nonpublic school students arises from its 11 year experience with the present on-premises program. We welcome the opportunity presented in the National Coalition case of demonstrating to this Court that the more than decade long history of this program is free from breaches or cracks in the constitutional wall separating church and state. For these reasons, as well as the legal reasons set forth below, we urge the Court to explicitly reserve the question of the constitutionality of New York's Title I program in any decision it reaches in this case.



## ARGUMENT

### THE CONSTITUTIONALITY OF TITLE I SHOULD BE EXPLICITLY RESERVED.

This case, as is evident from the record below, raises a question of the constitutionality of an Ohio program providing secular services and materials to nonpublic school children. The decision in this case should address itself solely to the constitutionality of the challenged Ohio program.

The appellants, in a footnote in their brief, question the constitutionality of on-premises Title I services in nonpublic schools. This obscure reference should be totally ignored in the decision of this case. Title I is not properly before the Court at this time and this case should provide no occasion for judgment of Title I. This position is consistent with and man-

dated by previous decisions of this Court. Specifically, it was on these grounds that this Court refused to reach the question of the constitutionality of on-premises Title I services when it arose in Wheeler v. Barrera, 417 U.S. 402 (1974). That ruling is thus dispositive in this case and is quoted in full.

> "The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals declined to pass on this significant issue, noting that since no order had been entered requiring on-the-premises parochial school instruction, the matter was not ripe for review. We agree. . . . [E]ven if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title



I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time, we intimate no view as to the Establishment Clause effect of any particular program.

> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971). It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding." 417 U.S. at 426-27 (emphasis added).

For other First Amendment cases in which this Court has reserved on issues not explicitly and necessarily raised see also Committee for Public Education and Religious

Liberty v. Nyquist, 413 U.S. 756 (1973) and Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

## CONCLUSION

In the decision of this case, this Court should explicitly reserve the question of the constitutionality of Title I.

March 25, 1977

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York,
Amicus Curiae.

L. KEVIN SHERIDAN,
BERYL KUDER,
of Counsel.